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FEB 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

G.D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENTS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND TO THE SUPPLEMENTAL BRIEF

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LAW REPRINTS EDITOR'S NOTE: AT THE TIME OF FILMING (FEBRUARY 12, 1982), THE COURT HAS NOT ACTED ON THIS SUPPLEMENTAL BRIEF AFTER ARGUMENT, BUT IT IS INCLUDED HEREIN IN THE INTEREST OF PROVIDING A COMPLETE RECORD.

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This memorandum responds to the Motion of Respondents For Leave To File A Supplemental Brief and to the Supplemental Brief of Respondents ("Supplemental Brief" or "Supp. Br.").

1. The Supplemental Brief makes an elaborate showing that a foreign corporation that is *not licensed to do business in New Jersey* may disclaim liability for franchise tax.* This point, how-

* The Supplemental Brief relies exclusively on the New Jersey Notice of Business Activities Report and its provisions for disclaiming franchise tax liability. However, the only corporations that file this notice are foreign corporations that have *not* obtained a certificate of authority to do business in New Jersey. This is clear from the instructions on the

(Footnote continued on following page)

ever, is not and has never been in dispute. On the contrary, the only point Searle has made in this regard is that a *previously unlicensed* foreign corporation that is forced to *obtain* a certificate of authority to do business in New Jersey automatically *assumes* a number of *new* obligations and burdens, one of which is the payment of franchise taxes. Pet. Br. 16-17; Pet. R. Br. 3 n.3; Tr. Or. Arg. 7-8. Because the Supplemental Brief demonstrates that unlicensed corporations have lesser obligations than licensed corporations, it supports Searle's position.

2. The Supplemental Brief reiterates respondents' claim that a foreign corporation can register an agent in New Jersey without qualifying to do business. As Searle has previously noted, respondents' contention is flatly inconsistent with a number of official and unofficial interpretations of New Jersey law: (1) the statements in *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 290, 292-293, 416 A.2d 372, 377, 378 (1980) that the *only* foreign corporations that have been "exempted" from the tolling statute are those licensed to do business in New Jersey; (2) the New Jersey Secretary of State's official interpretation of the law, Pet. R. Br., App. A; (3) the District Court's understanding of the tolling statute, Cert. Pet. 44a n.17; and (4) the *very* position *respondents* took in the District Court. See Cert. Pet. 44a n.17. As Searle has further pointed out (Pet. R. Br. 9), however, even if respondents' position were correct, it would affect only one of the grounds for holding the tolling statute violates the Commerce Clause—the doctrine of *Allenberg Cotton Co.* v. *Pittman*, 419

(Footnote continued from preceding page)
form (see Supp. Br. 1a) and from the explicit language of N.J.S.A. 14A:13-16 (1981-82 Pock. Part) (emphasis added):

> "A foreign corporation shall not be required to file a notice of business activities report if
>
> a. by the end of an accounting period for which it was otherwise required to file a notice of business activities report under this act, *it had received a certificate of authority to do business in the State* . . ."

U.S. 20 (1974)—and would have no effect on the other grounds Searle has advanced.

3. Searle received the Supplemental Brief on January 29, 1982, almost two months *after* the December 7, 1981, oral argument. There is no justification whatever for this tardy filing. To the limited extent Searle has referred to questions relating to franchise tax liability, Searle did so in both its opening brief filed in July, 1981, (Pet. Br. 18) and its reply brief filed in November, 1981, (Pet. R. Br. 3 n.3). Respondents have had ample opportunities to make their points. Therefore, even though the arguments made in the Supplemental Brief are completely irrelevant, Searle believes it would be appropriate for the Court to deny respondents' motion for leave to file the Supplemental Brief—in the interest of requiring adherence to orderly procedures.

Respectfully submitted,

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February 1982